IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

SINGLE BENCH

SECOND APPEAL NO. 365 OF 2005

APPELLANT
PLAINTIFF

Shyam Bai W/o Late Mangaluram Panika, Through L.R's Arjun Das S/o Hari Das Panika, aged about 31 years, R/o Village Ponda, Tahsil Gariyaband, Distt- Raipur C.G.

VERSUS

RESPONDENTS
DEFENDANTS

1. Balduram, S/o Guharam Panika, aged about 55 years, R/o Village Chaandapara, Gadhbehra, Pithaura, Tehsil and Distt – Mahasamund. C.G.
2. State of Chhattisgarh, Through the Collector Dhamtari, C.G.

MEMO OF SECOND APPEAL UNDER SECTION 100 OF THE CODE OF CIVIL PROCEDURE, 1908.

(17)

HIGH COURT OF CHHATTISGARH : BILASPUR

Second Appeal No. 365 of 2005

Appellant/ Plaintiff	:	**Shyam Bai W/o Late Mangaluram Panika, Through L.Rs Arjun Das S/o Hari Das Panika.**

Vs.

Respondents/ Defendants	:	1.	**Balduram**
		2.	**State of Chhattisgarh**

Appellant by Shri Rakesh Pandey, Advocate.

ORDER
(Passed on 02/12/05)

Dhirendra Mishra, J

The appellant has preferred this second appeal as the suit filed by the appellant/plaintiff for declaration of title, possession and damages has been rejected by the learned IInd Civil Judge, Class-I, Dhamtari vide order dated 04.10.2002 passed in Civil Suit No. 04-A/99 and the Civil Appeal No. 157-A/04 has also been dismissed by the learned Additional District Judge, Dhamtari vide impugned order dated 13.04.2005. (Parties hereinafter shall be referred to as per their description before the trial Court.)

2. The claim of the plaintiff is based on the Will of Ex.P/6 executed by the original plaintiff-Shyam Bai on 22.06.1985 i.e. three days after institution of the suit. The learned trial court has held the Will of Ex.P/6 suspicious on the ground that though the Will is written on two leaves, the first page of the Will does not bear the thumb impression of the testatrix and there is manipulation over the alleged thumb impression of Shyam Bai. The Will was executed in the presence of the plaintiff-beneficiary of the Will and there is discrepancy in the statements of the plaintiff and P.W.2 who has attested the Will.

3. The learned lower appellate Court has also held the Will of Ex.P/6 suspicious and as not proved on the ground that only one attesting witness Bharatlal has been examined by the plaintiff as P.W. 2 and this witness has not stated that the Will was executed by the testatrix in the presence of other attesting witness and that the other witness has signed the same in his presence as attesting witness. As per Section 68 of the Evidence Act and Section 63 (c) of the Succession Act, 1925, the Will is required to be attested by two attesting witness and accordingly, the Will has not been proved as per law.

4. Learned counsel for the appellant relying upon the judgment reported in **AIR 1981 N.O.C. 29 (All.)** in the matter of **Bala Prasad and etc. Vs. Bhola Nath and others** submits that where attestation of the Will by one witness is proved and the presence of other witness was also proved but his signature was not proved, the requirements of Section 68 and 69 of the Evidence Act is satisfied and the document becomes admissible in evidence.

5. However, further relying upon the judgment of the M.P. High Court delivered in the matter of **Chatra Pratap Singh Vs. Tulsi Prasad and others** reported in **2003 M.P.L.J. 293** learned counsel for the appellant/plaintiff submits that where the attesting witnesses are dead and the original document is not traceable, in that case proof of attestation and execution of the original documents can be done by leading secondary evidence.

6. I have heard learned counsel for the appellant/plaintiff.

7. Both the Courts below after marshalling the evidence available on record have arrived at the conclusion that the Will in question is a suspicious document and the plaintiff has not proved the execution of the Will as P.W. 2 Bharatlal has not stated that the Will was attested by another witness who was present at the time of execution. From perusal of the above cited judgment in the matter Bala Prasad and etc. (supra) it appears that it relates to a Will which was duly registered by the Sub-Registrar in the house of the executant. However, in the instant case the

(19)

Will is unregistered and the learned trial Court has found that first page of the Will does not contain thumb impression of the executant and has also pointed out towards certain suspicious circumstances regarding thumb impression of the executant over the Will.

8. Thus on the basis of aforesaid analysis, the concurrent findings of both the Courts below that the Will in question is a suspicious document is a finding of fact and the same has been arrived at on the basis of proper appreciation of evidence available on record and therefore, I am of the opinion that no substantial question of law arises for adjudication of this appeal. Accordingly, the appeal is dismissed. However, there shall be no order as to costs.

Sd/-
Dhirendra Mishra
Judge

Jahan;